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Federal Communications Commission

DA 98-1667

DISP

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
) CC Docket No. 98-79
GTE Telephone Operators)
GTOC Tariff No. 1)
GTOC Transmittal No. 1148)

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: August 20, 1998

Released: August 20, 1998

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On May 15, 1998, GTE filed Transmittal No. 1148 establishing a new offering, GTE DSL Solutions-ADSL Service, to become effective May 30, 1998 in portions of 14 states.¹ GTE describes its DSL service offering as an interstate data special access service that provides a high speed access connection between an end user subscriber and an Internet Service Provider (ISP) by utilizing a combination of the subscriber's existing local exchange physical plant (*i.e.*, copper facility), a specialized DSL-equipped wire center, and transport to the network interface, for example the frame relay switch, where the ISP will connect to GTE's network.² The DSL service offering will enable the simultaneous transmission of voice dialed calls and high speed data access over a single path, thereby reducing the need for subscribers to obtain additional lines for their Internet access capabilities, according to GTE.³ On May 29, 1998, the Common Carrier Bureau (Bureau) released an order suspending the transmittal for one day and requiring GTE to keep an accurate accounting of all revenue received from its GTE DSL Solutions-ADSL Service.⁴

¹ GTE Transmittal No. 1148. The fourteen states are: California, Florida, Hawaii, Illinois, Indiana, Kentucky, Michigan, Missouri, North Carolina, Ohio, Oregon, Texas, Virginia, Washington.

² GTE Transmittal No. 1148, Description and Justification at 1.

³ *Id.*

⁴ GTE Telephone Operators GTOC Transmittal No. 1148, CC Docket No. 98-79, DA 98-1020 (Com. Car. Bur., rel. May 29, 1998) (*Suspension Order*).

2. In the *Suspension Order*, we found that issues raised by petitioners⁵ in support of their petitions to reject, or petitions to suspend and investigate, GTE's Transmittal No. 1148 raised substantial questions of lawfulness that warrant investigation of this tariff.⁶ In this Order we designate for investigation under section 204(a) of the Communications Act (the Act) the question of whether GTE's DSL service offering constitutes an interstate access service, and thus is subject to the Commission's jurisdiction.

II. DISCUSSION

A. JURISDICTION

1. Background

3. GTE's Transmittal No. 1148 seeks to offer DSL service in portions of 14 states through an interstate access tariff.⁷ GTE contends that an interstate tariff is appropriate because: (1) Internet traffic is primarily interstate in nature; (2) GTE's DSL service offering involves dedicated transport of data; and (3) GTE's DSL service is an access service under section 69.2 of the Commission's rules.⁸ The Commission has not previously addressed the lawfulness of a DSL service in the context of an interstate tariff such as that filed by GTE.

2. Petitions

4. A number of petitioners argue that GTE's DSL service is an intrastate service offering that should be tariffed at the state level.⁹ AOL, Focal, and ICG contend in their petitions that seventeen states have already held that traffic from an end user to an ISP is local, and that GTE's tariff is an attempt to forum shop to avoid these decisions.¹⁰ Specifically, ALTS maintains that these states have held that

⁵ The following parties filed petitions in the proceeding: MCI Telecommunications, Inc. (MCI), Northpoint Communications (Northpoint), Focal Communications (Focal) and ICG Communications (ICG), Association for Local Telephone Service (ALTS), America Online, Inc. (AOL), Intermedia Communications (Intermedia), California Cable Television Association (CCTA), Teleport Communications Group, Inc. (TCG), Commercial Internet Exchange Association (CIX), Cox Communications (COX), E*Spire Communications (E*Spire), State of Oregon Public Utilities Commission, and ACI Corporation (ACI). We note that Sprint Corporation filed its petition after the time period designated by the Public Notice; however, due to the importance of the issues raised in its petition, we will consider it.

⁶ 47 U.S.C. § 204(a).

⁷ GTOC Transmittal No. 1148, Description and Justification at 2.

⁸ 47 C.F.R. § 69.2(b); GTOC Transmittal No. 1148, Description and Justification at 2.

⁹ See ALTS Petition at 1; Intermedia Petition at 2; E*Spire Petition at 2; Focal and ICG Communications Petition at 1; AOL Petition at 3; CCTA Petition at 4; and CIX Petition at 4.

¹⁰ ALTS Petition at 1-2; AOL Petition at 5; Focal and ICG Petition at 4.

incumbent local exchange carrier (ILECs) must pay reciprocal compensation¹¹ when they exchange this type of traffic with competitive local exchange carriers (CLECs).¹² Further, ALTS argues that Commission precedent holds that ISPs are end users, not telecommunications carriers, and therefore GTE's DSL service offering tariff cannot constitute local exchange access under Part 69.¹³

5. Several parties contend that a DSL call terminates at the point where the call reaches an ISP interconnected to GTE.¹⁴ For example, ALTS argues that the telecommunications portion of the DSL call terminates at the point where the call reaches an ISP interconnected to GTE because ISPs are end users, and that any subsequent information services provided by the ISPs are irrelevant in determining the "jurisdictional end points."¹⁵ GTE's DSL tariff, therefore, should be subject to state ratemaking authority. ALTS also contends that any change in the states' authority should be done in the context of a rulemaking.¹⁶

6. Several parties also contest GTE's characterization of the service as an access service.¹⁷ They argue that GTE's DSL service is offered only to ISPs interconnected to GTE wire centers, and not to telecommunications carriers.¹⁸ Focal and ICG argue that, in order for a service to be classified as an access service, the service must be an offering of access to telephone exchange services or facilities for the purpose of origination and termination of telephone toll service. Focal and ICG contend that, because the service provided by ISPs is not telephone toll service, GTE's DSL service will not terminate in a telephone toll service and therefore is not an access service.¹⁹

7. Northpoint, in an *ex parte* presentation, raised another jurisdictional argument.²⁰ Northpoint contends that data CLECs could be subject to a price squeeze unless regulators review both GTE's retail DSL rates and GTE's wholesale charges for unbundled network elements (UNEs) used by competitors to provide their own DSL services. Northpoint argues that the Commission does not have

¹¹ Reciprocal compensation is an arrangement between two carriers that "provide[s] for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." 47 U.S.C. § 252(d)(2)(A)(i). *See also* 47 U.S.C. § 251(b)(5) (requiring LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications).

¹² ALTS Petition at 9.

¹³ ALTS Petition at 10. *See also* AOL Petition at 3.

¹⁴ *See* ALTS Petition at 3; Focal and ICG Petition at 1.

¹⁵ ALTS Petition at 9.

¹⁶ *Id.*

¹⁷ *See, e.g.,* Focal and ICG Petition at 2; CCTA Petition at 4.

¹⁸ ALTS Petition at 10.

¹⁹ Focal and ICG Petition at 2. *See also* CCTA Petition at 4.

²⁰ Northpoint Ex Parte Presentation to Jane E. Jackson *et al.* on June 23, 1998.

the UNE cost data needed to conduct the necessary analysis because UNEs are tariffed at the state level, while GTE is tariffing retail DSL services at the federal level. This allows, according to Northpoint, the possibility that cost data submitted at the federal level will be significantly different than the cost data submitted at the state level. Northpoint, therefore, argues that the Commission should consider deferring the retail tariffing of DSL services to the states, to ensure consistent tariff review.

3. Reply

8. GTE contends that its DSL service is properly tariffed at the federal level. It argues that Internet traffic is primarily interstate in nature, and that the ISP connects end users to information both locally and worldwide.²¹ GTE contends that "it is the nature of the communication itself rather than the physical location of the technology that determines the jurisdictional classification of a service."²² GTE states that the Commission also has recognized that, even where a user's Internet destination is local or intraLATA, "there is no existing mechanism" to support jurisdictional segregation of traffic.²³

9. GTE also argues that its DSL service offering is part of "one continuous transmission path," originating at the end user's site and terminating at the Internet servers accessed.²⁴ It should not be viewed, argues GTE, as one local call terminating at the ISP's location, followed by another transmission from the ISP to the Internet.²⁵ GTE argues that the Commission has already rejected a bifurcated jurisdictional analysis in the *Memory Call Order*.²⁶

10. GTE also points out that the ISP access charge exemption would not be necessary if the traffic were not jurisdictionally interstate.²⁷ GTE states that there is support for its jurisdictional position in the *Access Charge Reform Order*, which states: "[A]lthough information service providers (ISPs) may use incumbent LEC facilities to originate and terminate interstate calls, ISPs should not be required to pay interstate access charges."²⁸

11. GTE further argues that its DSL service offering is an access service under section 69.2(b) of the Commission's rules, which defines access service as "includ[ing] services and facilities provided

²¹ GTE Reply at 8, relying on *American Civil Liberties Union v. Reno*, 929 F.Supp 824, 830-849 (E.D. Pa. 1996), affirmed 177 S.Ct. 2329 (1997).

²² GTE Reply at 8, citing *New York Telephone Company v. FCC*, 631 F.2d 1059, 1066 (2nd Cir. 1980).

²³ GTE Reply at 8 (citing from *Digital Tornado: The Internet and Telecommunications Policy*, OPP Working Paper (March 1997) at 45).

²⁴ GTE Reply at 9.

²⁵ *Id.* at 9-10.

²⁶ *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, Memorandum Opinion and Order, 12 FCC Rcd 1619 (1992) (*Memory Call Order*).

²⁷ GTE Reply at 9.

²⁸ GTE Reply at 9 (citing *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 at 16131-16132 (1997) (*Access Charge Reform Order*)).

for the origination or termination of any interstate or foreign telecommunication.²⁹ The difference between GTE's DSL service offering and traditional dial-up access services using standard business lines, states GTE, is that its service is a dedicated offering. It is, according to GTE, a special, not switched, access arrangement.³⁰ GTE maintains, therefore, that the state decisions cited by petitioners regarding reciprocal compensation for switched calls to ISPs are not relevant to the jurisdictional classification of GTE's DSL service offering.

4. Discussion

12. The threshold issue raised by GTE's tariff and the petitioners is whether GTE's DSL service offering is an interstate service, properly tariffed at the federal level, or an intrastate service that should be tariffed at the state level. We find that the record in this proceeding to date does not contain sufficient information on which to decide this issue. We, therefore, designate for investigation the question whether GTE's DSL service offering is a jurisdictionally interstate service. We solicit comments on the jurisdictional issues raised by GTE's DSL service offering and whether it should be tariffed at the state or federal level. We also solicit comments on whether the Commission should defer to the states the tariffing of retail DSL services in order to lessen the possibility of a price squeeze.

B. UNBUNDLING OF DSL SERVICE OFFERING ELEMENTS

1. Background

13. Section 251(c)(3) of the Act requires ILECs to provide requesting telecommunications carriers nondiscriminatory access to network elements on an unbundled basis at any technical feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.³¹ Additionally, section 251(c)(2) requires ILECs to provide interconnection to any requesting telecommunications carrier at any technically feasible point. The interconnection must be at least equal in quality to that provided by the ILEC to itself or its affiliate, and must be provided on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.³² Section 251(c)(4) of the Act requires all ILECs to offer for resale any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.

²⁹ 47 C.F.R. § 69.2(b).

³⁰ GTE Reply at 10.

³¹ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15612, 15658, paras. 218, 312 (1996) (*Local Competition Order*), aff'd in part and vacated in part *sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), writ of mandamus issued *sub nom. Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir. Jan. 22, 1998), petition for cert. granted, Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141 (U.S. Jan. 26, 1998) (collectively, *Iowa Utils. Bd.*), Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), aff'd *sub nom. Southwestern Bell Telephone Company v. FCC*, Case Nos. 97-3389, 97-3576, 97-3663, and 97-4106, (8th Cir., August 10, 1998), further recons. pending.

³² The Commission determined that the points of access to unbundled elements may also serve as points of interconnection. *Id.* at 15809.

14. Additionally, the Commission's Expanded Interconnection rules require the largest ILECs to file tariffs with the Commission to offer collocation to parties, such as CLECs, that wish to terminate interstate special access and switched access transport facilities.³³ Thus, a requesting carrier has the choice of negotiating an interconnection agreement pursuant to sections 251 and 252 of the Act for interconnection, services, or network elements or taking tariffed interstate service under the Commission's Expanded Interconnection rules.³⁴ Under the Commission's expanded interconnection rules, LECs are required to provide interconnection with special access services within 45 days of receiving a *bona fide* request for such a service.³⁵

2. Petitions

15. Petitioners have asserted that GTE's DSL service offering as tariffed violates section 251 of the Act. Specifically, E*Spire and Intermedia assert that, if GTE is permitted to categorize DSL service as an exchange access service only, GTE could effectively succeed in removing DSL service from the requirement under section 251(c)(4) of the Act that ILECs make their retail telecommunications services available for resale by competitors.³⁶ TCG asserts that the proposed bundling of DSL service with GTE's existing frame relay system would preclude CLECs and other telecommunications carriers from interconnecting their networks at any technically feasible point and would restrict CLECs' and their customers' ability to configure their interconnected systems as they see fit.³⁷ Moreover, TCG asserts that, to ensure that GTE does not violate its statutory obligations by discriminating against its competitors in their use of DSL services, the Commission must require that GTE make DSL-suitable loops available as unbundled elements to its competitors, including non-discriminatory access to GTE's Operations Support Systems,³⁸ on the same terms and conditions as it uses them itself to make DSL services available to its own customers.

16. MCI raises a related interconnection issue by asserting that the Commission's expanded interconnection orders require that GTE's DSL loop and frame relay system be tariffed separately.³⁹ MCI asserts that, by separately tariffing the frame relay service and DSL service, customers will be given the opportunity to purchase only the DSL loop.⁴⁰ MCI notes that the Commission, in its *Virtual Collocation Order*, stated that "our expanded interconnection policy is designed to facilitate competition for special access and switched transport services, essentially by making it possible to buy only those LEC

³³ *Id.*

³⁴ *Id.* at 15809.

³⁵ *Expanded Interconnection with Local Telephone Company Facilities*, Memorandum and Opinion and Order, 9 FCC Rcd 5154, 5180 (1994) (*Virtual Collocation Order*).

³⁶ E*Spire Petition at 3-4; Intermedia Petition at 3-4.

³⁷ TCG Petition at 2.

³⁸ TCG Petition at 5.

³⁹ MCI Petition at 5.

⁴⁰ *Id.*

transmission and distribution links that a customer wants."⁴¹

3. Reply

17. In response to petitioners' claims, GTE asserts that it is complying fully with its interconnection and unbundling obligations because it has provided and will continue to provide requesting telecommunications carriers access to unbundled DSL-conditioned loops in accordance with the requirements of section 251(c)(3).⁴² GTE disputes petitioners' resale-related claims. GTE asserts that the DSL service offering is an access service and thus is not subject to the resale requirements of section 251(c)(4).⁴³ In response to MCI's expanded interconnection concern, GTE asserts that the issue is not ripe for review. GTE notes that expanded interconnection tariffs must be filed within 45 days of a *bona fide* request for such access and asserts that it has not received such a request.⁴⁴

4. Discussion

18. We do not designate for investigation issues arising under sections 251 and 252 or the Commission's expanded interconnection rules in this section 204(a) proceeding. Although we do not designate these issues here, we recognize that CLECs have significant concerns regarding GTE's DSL offering and its relation to a requesting carrier's rights under section 251(c) of the Act and the Commission's expanded interconnection rules.

19. We note that, by using its network to provide DSL service, GTE is subject to the section 251 obligations. The Commission recently determined that advanced services, including DSL services, are telecommunications services subject to the obligations of section 251(c).⁴⁵ In the *Wireline Advanced Services Order/NPRM*, the Commission stated that the interconnection obligations of section 251(c)(2) apply to DSL services offered by an ILEC.⁴⁶ In addition, the Commission determined that the facilities and equipment used by ILECs to provide advanced services are network elements and are subject to section 251(c).⁴⁷ Similarly, DSL services offered by ILECs are subject to the resale requirements of section 251(c)(4).⁴⁸ We note that GTE has stated that its DSL service is to be offered on an unbundled

⁴¹ MCI Petition at 5 (citing *Virtual Collocation Order*, 9 FCC Rcd 5154, 5159).

⁴² GTE Reply at 22.

⁴³ *Id.*

⁴⁴ GTE Reply at 31. See also *Virtual Collocation Order*, 9 FCC Rcd at 5180.

⁴⁵ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, and CCB/CPD No. 98-15, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, FCC 98-188, at para. 32 (rel. Aug. 7, 1998) (*Wireline Advanced Services Order/NPRM*).

⁴⁶ *Id.* at paras. 46-49.

⁴⁷ *Wireline Advanced Services Order/NPRM*, FCC 98-188 at para. 18.

⁴⁸ *Id.* at para. 30. In the *Local Competition Order*, the Commission stated that exchange access services are not subject to the resale requirements of section 251(c)(4), "because the vast majority of the purchases of such services are telecommunications carriers, not end users." *Local Competition Order*, 11 FCC Rcd 15499 at paras. 871,

basis so that CLECs may interconnect their networks with GTE's ADSL network at any technically feasible point.⁴⁹ If it becomes apparent that GTE is not meeting these obligations and competitors have difficulty negotiating interconnection agreements, obtaining access to unbundled network elements, or purchasing telecommunications services for resale pursuant to sections 251 and 252, competitors may seek mediation pursuant to section 252(a)(2) or arbitration pursuant to section 252(b).

20. GTE also remains subject to the Commission's expanded interconnection rules.⁵⁰ If competitors have difficulty seeking interconnection pursuant to the Commission's expanded interconnection rules, they may request that the Commission assess a forfeiture penalty against GTE pursuant to section 1.80 of the Commission's rules.⁵¹

III. Filing Schedules

21. This investigation will be conducted as a notice and comment proceeding. We have designated CC Docket No. 98-79. GTE is designated as a party to this proceeding, and shall file its direct case no later than September 3, 1998. The direct case must present the party's positions with respect to the issues described in this Order. Pleadings responding to the direct case may be filed no later than September 14, 1998, and must be captioned "Oppositions to Direct Case" or "Comments on Direct Case." GTE may file a "Rebuttal" to oppositions or comments no later than September 21, 1998.

22. An original and six copies of all pleadings shall be filed with the Secretary of the Commission. In addition, parties shall file two copies of any such pleadings with the Competitive Pricing Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Parties shall also deliver one copy of such pleadings to the Commission's commercial copying firm, International Transcription Service, Inc., 1231 20th Street, NW, Washington, DC 20036. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Office of the Secretary, Federal

873-74. In the *Wireline Advanced Services Order/NPRM*, the Commission tentatively concluded, and sought comment on its tentative conclusion, that to the extent advanced services, including DSL services, are exchange access services, such services are fundamentally different from the exchange access services to which the Commission referred in the *Local Competition Order*. *Wireline Advanced Services Order/NPRM* at paras. 188-189. The Commission is therefore considering the application of section 251(c)(4) to advanced services in a separate proceeding.

⁴⁹ GTE Reply at 22.

⁵⁰ *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (*Special Access Expanded Interconnection Order*), *recon.* 8 FCC Rcd 7341 (1993) (*Special Access Expanded Interconnection Reconsideration Order*); *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Transport Phase I, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374 (1993) (*Switched Transport Expanded Interconnection Order*); *remanded sub nom Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994); *Expanded Interconnection with Local Telephone Companies*, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994) (*Virtual Collocation Order*). See also sections 64.1401 and 64.1402 of the Commission's rules, 47 C.F.R. §§ 64.1401, 64.1402.

⁵¹ See 47 C.F.R. § 1.80.

Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Such comments should specify the docket number of this investigation. Parties are also encouraged to submit their pleadings electronically through the Electronic Tariff Filing System.

23. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the order.

IV. *Ex Parte* Requirements

24. This tariff investigation is a "permit-but-disclose proceeding" and subject to the "permit-but-disclose" requirements under section 1.1206(b) of the rules, 47 C.F.R. § 1.1206(b), as revised. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.⁵² Other rules pertaining to oral and written presentations are set forth in section 1.1206 (b), as well.

V. Paperwork Reduction Act

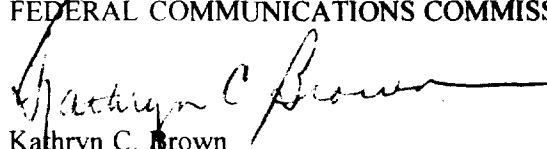
25. The collections of information contained within are contingent upon approval by the Office of Management and Budget, in accordance with the provisions of the Paperwork Reduction Act, 44 U.S.C. §§ 3506 *et seq.*

VI. ORDERING CLAUSES

26. **IT IS ORDERED** that, pursuant to sections 4(i), 4(j), 201(b), 203(c), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203(c), 204(a), 205 and 403, and sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, the issues set forth in this Order **ARE DESIGNATED FOR INVESTIGATION**.

27. **IT IS FURTHER ORDERED** that GTE is a party to this proceeding and **SHALL INCLUDE**, in its direct case, a response to each issue designated in this Order.

FEDERAL COMMUNICATIONS COMMISSION


Kathryn C. Brown
Chief

Common Carrier Bureau

⁵² See 47 C.F.R. §1.1206 (b)(2), as revised.